

² The Board notes that following the June 13, 2019 decision, OWCP received additional evidence. However, the Board's *Rules of Procedures* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

2006 through February 10, 2014, pursuant 5 U.S.C. § 8106(b)(2) of FECA, because she knowingly failed to report her employment activities and earnings; (2) whether OWCP properly found that appellant received an overpayment of compensation in the amount of \$183,933.85 from November 12, 1999 through March 16, 2006 and December 31, 2006 through February 10, 2014 as she forfeited her entitlement to compensation for these periods; (3) whether OWCP properly found appellant at fault in the creation of the \$183,933.85 overpayment, thereby precluding waiver of recovery of the overpayment; (4) whether OWCP properly required recovery of the \$183,933.85 overpayment by deducting \$382.15 from appellant's continuing compensation payments every 28 days; (5) whether OWCP properly found that appellant received an overpayment of wage-loss compensation in the amount of \$7,511.77 for the period January 1, 2016 through April 27, 2019, for which she was without fault, because she concurrently received FECA wage-loss compensation benefits and Social Security Administration (SSA) age-related retirement benefits without appropriate offset; (6) whether OWCP properly denied waiver of recovery of the \$7,511.77 overpayment; and (7) whether OWCP properly required recovery of the \$7,511.77 overpayment by deducting \$263.26 from appellant's continuing compensation payments every 28 days.

FACTUAL HISTORY

This case has previously been before the Board.³ The facts and circumstances as set forth in the Board's prior order are incorporated herein by reference. The relevant facts are as follows.

On June 27, 1988 appellant, then a 38-year-old voucher examiner, filed an occupational disease claim (Form CA-2) alleging that she sustained depression, anxiety, and post-traumatic stress disorder (PTSD) causally related to factors of her federal employment. OWCP accepted the claim for a recurrent episode of major depression. It paid appellant wage-loss compensation beginning July 30, 1989.

On February 12, 2001, January 18, 2002, March 10, 2003, June 23, 2004, March 3, 2005, March 16, 2006, March 31, 2008, March 25, 2009, February 28, 2010, February 6, 2011, February 10, 2012, January 26, 2013, and February 10, 2014, appellant signed EN1032 forms which contained language advising her what type of employment activities, earnings, and volunteer activities that she was required to report for each 15-month period prior to the time she signed each form. The EN1032 forms instructed her to report all employment for which she received a salary, wages, income, sales commissions, piecework, or payment of any kind. Appellant was directed to report all self-employment or involvement in business enterprises, including (but not limited to) farming, sales work, operating a business, and providing services in exchange for money, goods, or other services. The forms contained certification clauses informing her of the consequences of not accurately reporting her employment activities, such as being subjected to criminal penalties and losing the right to receive workers compensation. On the EN1032 forms, appellant indicated that, during the previous 15-month period covered by each form, she had not worked for an employer or been self-employed, had no involvement in a business enterprise, and had not engaged in volunteer work.

³ *Order Remanding Case*, Docket No. 17-1396 (issued May 4, 2018).

In an investigative report dated August 23, 2016, J.B., special agent with the Office of Inspector General (OIG) for the Department of Labor, advised that a criminal investigation revealed that appellant had provided “false statements to OWCP regarding her work activities and abilities.” He related that she had founded and served as the pastor/reverend for the church of the Beloved United in Christ (the church) in Tucson, Arizona and “actively made attempts to conceal her work activities and the very existence of the [c]hurch.” J.B. advised that appellant had operated the church since at least November 2001. He asserted that annual reports provided to the State of Arizona in 2002-04, and 2007 had identified her as the reverend or director of the church, and that annual reports in 2008-10 listed her life partner, C.M., as the director. A post office box for the church from December 2, 1999 until April 22, 2011 identified appellant as the minister. J.B. indicated that advertisements in the telephone directory for the church listed her e-mail address and indicated that the services provided included counseling. He described surveillance performed in November and December 2009.

J.B. related that appellant had, on a quality assurance questionnaire, specified that she had not attended school or performed any activity since her injury; however, she had attended Claremont School of Theology from May 1996 to May 1999, earning a Master of Divinity degree. He described interviews with former church members in 2011 confirming that appellant had worked full time as the reverend/pastor of the church.

J.B. advised that appellant had purchased the property used as the church. In May 10, 2006 she refinanced the property for a cash-out and debt consolidation. J.B. asserted on the refinance paperwork that she was employed as a reverend with the church and received a monthly pastoral allowance of \$1,055.00. An April 17, 2006 letter from the treasurer of the church advised that the church had paid the mortgage on appellant’s house since 2001 and would continue to pay the mortgage for the next three years and thereafter until the mortgage was paid. In refinancing the property, appellant received \$6,842.48 in cash and paid \$27,313.00 to creditors.

J.B. asserted that appellant had applied to open consumer accounts in March 2003, July 2009, and September 2009 with Wells Fargo bank, listing her employer as the church. She also opened business accounts with Wells Fargo for the church, with herself as an authorized signatory. From November 9, 2004 through May 12, 2010, appellant had transferred approximately \$18,065.00 from her personal account to the church account, and from January 14, 2004 to December 14, 2010, she had transferred approximately \$28,781.00 from the church account to her personal checking account. In 2007 a code enforcement inspector ordered appellant to remove a sign for the church in front of the house as it violated ordinances. An entry on a website in 2012 for the church provided appellant’s e-mail address for contact information. It listed service times on Sunday and Wednesday and indicated that pastoral counseling was available. On April 12, 2012 a realtor’s website listed the residence used as the church for sale, noting that the property was used “as a Church hall.” The OIG contacted the realtor, who related that a woman ran the property as a church but was considering retiring and wanted to sell the property. In August 2013 OIG agents spoke with appellant, who informed them that she was an ordained minister and volunteered at the church, which had a congregation of 8 to 10 people.

J.B. noted that appellant was indicted on January 8, 2015 by a grand jury with the District of Arizona-Tucson for violating 18 U.S.C. § 641, theft of money or property of the United States,

and 18 U.S.C. § 1920, making a false statement to obtain benefits from OWCP. He advised that the government had dismissed the indictment on April 22, 2016.

J.B. submitted evidence obtained during the investigation. A March 3, 2000 addendum to a certificate of authority form from Wells Fargo bank indicated that appellant was an authorized signer on a church account created April 13, 2004 and provided her title as reverend. On March 9, 2000 she applied for another business account for the church with Wells Fargo, identifying herself as pastor. A July 13, 2001 certificate of authority form listed appellant as pastor. On applications for a consumer bank account dated March 20, 2003, July 15 and September 18, 2009, appellant identified her current employer as the church.

The OIG office submitted a form listing transfers from appellant's checking account on specific dates to the church's business checking account from November 9, 2004 until May 12, 2010, with the amount totaling \$18,065.00. From January 4, 2004 until December 14, 2010, she transferred approximately \$28,891.00 from the church business checking account to her personal checking account.

In a statement dated April 17, 2006, C.M., treasurer of the church, advised that the church had paid the mortgage on appellant's home since 2001 and would "continue to do so through the next three years and beyond until the mortgage is paid off completely.

On May 10, 2006 appellant completed a Uniform Residential Loan Application for the church property. She listed monthly income of \$3,751.47 in other income and indicated that she had a pastoral allowance paid for by the church.⁴ On another Uniform Residential Loan Application form of the same date, appellant listed her employer as the church and indicated that she had worked at this job for seven years. She specified that she received \$1,318.75 monthly from the church for a housing allowance. Appellant signed a form agreeing to use the property as her primary residence.

A June 10, 2006 settlement agreement for the property used as the church indicated that appellant had received over \$6,000.00 in cash for the refinance and that various creditors had also been paid with the proceeds.

In a quality assurance questionnaire form signed and notarized December 7, 2009, appellant responded "N/A" to the questions on the form regarding whether she had attended any school since her disability began, whether she had any hobbies including church, whether she performed any volunteer work, whether she was employed or self-employed, or involved with a nonprofit organization.

The OIG's office submitted a service bulletin for the church dated July 21, 2013 indicating that appellant was the reverend. It also submitted a blank pledge card and a copy of the grand jury indictment of her for violating 18 U.S.C. § 641 and 18 U.S.C. § 1920.

In a May 18, 2011 report of interview, J.B. advised that he and S.M., another special agent, had interviewed L.B., a former member of the church. L.B. advised that she had met appellant

⁴ In 2006 appellant received around \$1,126.68 from OWCP every 28 days on the periodic rolls.

when she was doing an internship at a local Episcopal Church after receiving a doctorate in divinity. In 2000 L.B. attended an organizational meeting for the church at appellant's home. The group rented space in a local church. L.B. learned that appellant had purchased property to use for the church and that an elderly woman had given her money for the down payment. She advised that she donated around \$5,000.00 a year each year that she had attended the church. L.B. indicated that appellant saw clients for therapy at the church, charging \$10.00 to \$40.00 per session unless the individual was unable to pay. When the property was refinanced, appellant called all the members to the church to remove all church-like items so that it looked like residential property. L.B. found documents showing that appellant had incorporated her personal debt into the refinancing of the church property. She learned that the property had been refinanced three times.

In a report of interview dated May 18, 2011, J.B. advised that on May 11, 2011 he and S.M. had interviewed P.L., who had been a member of the church three or four years earlier. P.L. advised that the church had a maximum of 20 to 25 people, with usually only 8 to 10 in attendance. She related that an elderly woman, E.H., had given appellant \$25,000.00 to purchase the church property. P.L. and her husband gave \$300.00 to \$400.00 each Sunday to pay the mortgage on the church. They left the church around 2007 or 2008. P.L. confirmed that appellant worked full-time as the reverend, conducting a service on Sunday, Bible study on Wednesday, providing pastoral counseling, handling the church businesses, and being at the church daily from 11:00 a.m. until 7:00 p.m. except for Mondays.

In a report of interview dated April 12, 2012, J.B. advised that he had interviewed M.P., G.P., and D.P. M.P. and G.P. related that they had attended the church 10 to 11 years earlier. Appellant was the pastor of the church, which had a maximum of 20 to 30 members. M.P. did not know if appellant received compensation but asserted that she "ran the place" and controlled the finances. M.P. related that an individual had provided \$40,000.00 to \$50,000.00 to purchase the church property and that she also had donated money for the purchase of the property. She advised that the church felt like a cult.

In a report of interview dated April 12, 2012, T.T. related that the church had over 20 members at its peak but had lost members over time. He gave an offering each week of around \$10.00 to \$20.00.

In a memorandum dated April 23, 2012, J.B. advised that he had telephoned the realtor who had listed the church property for sale. The realtor advised that the woman who owned the property ran it as a church, but was considering retiring and wanted to sell the property.

In an August 11, 2013 report of interview, J.B. advised that he and S.M. had entered the property used as the church. The area inside was set up as a sanctuary, with crucifixes on the wall, an altar, and chairs lined in rows. Appellant informed the agents that she volunteered at the church

on Sundays, had been an ordained minister for 20 years, and had a small congregation of 8 to 10 people. She gave them a business card for the church identifying herself as the minister.⁵

Surveillance activity logs dated August 2013 indicated that appellant drove to the church each day from August 7 to 11, 2013.

In Form EN1032 dated January 31, 2017, appellant indicated that she received a regular retirement check.

On March 9, 2017 OWCP requested that appellant verify whether she received retirement benefits from the Office of Personnel Management (OPM).

By decision dated March 10, 2017, OWCP found that appellant had forfeited her entitlement to compensation from November 12, 1999 through March 16, 2006 and from December 31, 2006 through February 10, 2014 under 5 U.S.C. § 8106(b) as she knowingly failed to report earnings from employment.

On March 10, 2017 OWCP advised appellant of its preliminary determination that she had received an \$183,933.95 overpayment of compensation for the periods November 12, 1999 through March 6, 2006 and December 31, 2006 through February 10, 2014 as she had forfeited her entitlement to compensation. It provided its calculations of the amount of compensation paid during the periods and attached a payment history, noting that it had manually calculated the first and last periods of each forfeiture period. OWCP further notified appellant of its preliminary finding that she was at fault in the creation of the overpayment. It provided her with an overpayment action request form and an overpayment recovery questionnaire (Form OWCP-20). Additionally, OWCP notified appellant that, within 30 days of the date of the letter, she could request a telephone conference, a final decision based on the written evidence, or a prerecoupment hearing.

In a letter dated March 22, 2017, appellant advised OWCP that she did not receive retirement benefits from OPM but instead received “regular retirement” benefits from SSA.

On March 28, 2017 appellant requested a prerecoupment hearing before a representative of OWCP’s Branch of Hearings and Review. In a completed Form OWCP-20, she provided monthly income of \$2,474.89 and listed monthly expenses of \$2,320.00. Appellant alleged that she was 1 of 11 people who had founded the church, that she was only listed as a signer on accounts, and that she did not receive contributions or any salary.

By decision dated April 18, 2017, OWCP finalized its preliminary determination finding that appellant had received an \$183,933.95 overpayment of compensation as she had forfeited her

⁵ The OIG submitted surveillance activity log forms from 2009 recording activity at the church. It also submitted a 2011 police report that appellant had filed against an OWCP referral physician. The case was closed. S.A. submitted a memorandum from a discussion on May 23, 2011 with R.M., a city enforcement inspector, indicating that he had inspected the property at the location of the church and found a large sign advertising service times. Appellant advised that the property was not used as a church. S.A. submitted information about the signage violation and an advertisement showing an auction on the property had been postponed. A June 20, 2011 letter indicated that appellant attended Claremont School of Theology from May 1996 to May 1999 and earned a Master of Divinity degree.

entitlement to compensation for the periods November 12, 1999 through March 6, 2006 and December 31, 2006 through February 10, 2014. It further finalized its finding that she was at fault in the creation of the overpayment, and determined that it would withhold \$366.40 from her continuing compensation payments every 28 days to repay the overpayment.

Appellant appealed to the Board. By order dated May 4, 2018, the Board set aside the April 18, 2017 decision.⁶ It found that appellant had timely requested a prerecoupment hearing and remanded the case for OWCP to respond to her request.

On April 26, 2019 SSA provided OWCP with a Federal Employees Retirement System (FERS)/SSA dual benefit calculation form.⁷ The form indicated that with FERS, appellant was entitled to a monthly payment of \$1,140.80, effective January 2016, \$1,144.20, effective December 2016, \$1,167.00, effective December 2017, and \$1,199.60, effective December 2018. Without FERS, she was entitled to a monthly payment rate of \$955.60 effective January 2016, \$958.40 effective December 2016, \$977.50 effective December 2017, and \$1,004.80 effective December 2018.

A telephonic hearing was held on March 19, 2019. At the hearing, appellant indicated that she was challenging both the forfeiture and the overpayment decisions. She argued that 12 people had founded the church and that others served as pastors or reverends at the church. Appellant advised that she went to the church building to avoid the stress of her partner's Alzheimer's disease. She had obtained a degree from Claremont but was not capable of seeking employment. Appellant advised that she claimed to be employed by the church in order to get loans from the bank and that the amount that she had listed as income was the amount of her compensation payments from OWCP. She asserted that she was a member rather than a volunteer at the church. Appellant maintained that there were four reverends. OWCP's hearing representative requested that she submit an updated Form OWCP-20.

On March 19, 2019 OWCP sent appellant a Form OWCP-20 for completion.

On May 1, 2019 OWCP completed a FERS offset calculation form for the period January 1, 2016 through April 27, 2019. It found that effective January 1, 2016, the monthly offset was \$185.20, or \$170.95 every 28 days; effective December 1, 2016, the monthly offset was \$185.80, or \$171.51 every 28 day days; effective December 1, 2017, the monthly offset was \$189.50 or \$174.92 every 28 days; and effective December 1, 2018, the monthly offset was \$194.80, or \$179.82 every 28 days. It divided the 28-day offset amount to find the daily amount, which it multiplied by the number of days in each period from January 1, 2016 through April 27, 2019 to find the amount that it had overpaid appellant for each period. OWCP added the amounts for each period and determined that it should have offset a total of \$7,511.77 from her wage-loss compensation.

⁶ *Supra* note 3.

⁷ SSA initially completed a form indicating that appellant's rate with FERS was less than her rate without FERS. On March 19, 2019 OWCP requested clarification, noting that the figures provided were inaccurate.

On May 9, 2019 OWCP advised appellant of its preliminary determination that she had received an overpayment of \$7,511.77 for the period January 1, 2016 through April 27, 2019 because it had failed to reduce her wage-loss compensation benefits by the portion of her SSA age-related retirement benefits that were attributable to federal service.⁸ It further advised her of its preliminary determination that she was without fault in the creation of the overpayment. OWCP provided appellant with an overpayment action request form and an overpayment recovery questionnaire (Form OWCP-20). Additionally, it notified her that, within 30 days of the date of the letter, she could request a telephone conference, a final decision based on the written evidence, or a prerecoupment hearing.

By decision dated May 17, 2019, OWCP's hearing representative affirmed the March 10, 2017 forfeiture decision. In a separate decision of even date, he found that appellant had received an overpayment of wage-loss compensation in the amount of \$183,933.85 as she had forfeited her entitlement to compensation from November 12, 1999 through March 16, 2006 and December 31, 2006 through February 10, 2014. The hearing representative determined that she was at fault in the creation of the overpayment and thus not eligible for waiver of recovery of the overpayment.⁹ He noted that appellant had not submitted an updated Form OWCP-20 with supporting documentation as requested. The hearing representative determined that OWCP should deduct \$382.15 from her continuing compensation payments every 28 days to repay the overpayment.

By decision dated June 13, 2019, OWCP finalized its May 9, 2019 preliminary determination finding that appellant had received an overpayment of compensation in the amount of \$7,511.77 for the period January 1, 2016 through April 27, 2019 because she had concurrently received FECA wage-loss compensation and SSA age-related retirement benefits without the appropriate offset. It further determined that she was without fault in the creation of the overpayment, but denied waiver of recovery. OWCP found that appellant had not submitted information supporting waiver of recovery. It determined that it would recover the overpayment by deducting \$236.26 every 28 days from appellant's continuing compensation payments.

LEGAL PRECEDENT -- ISSUE 1

Section 8106(b) of FECA¹⁰ provides that an employee who "fails to make an affidavit or report when required or knowingly omits or understates any part of his earnings, forfeits his right to compensation with respect to any period for which the affidavit or report was required."¹¹

An employee, however, can only be subjected to the forfeiture provision of 5 U.S.C. § 8106 if he or she knowingly failed to report employment or earnings. It is not enough to merely establish

⁸ A notification of personnel action (SF-50) dated January 14, 1990 indicated that appellant's retirement plan was FERS and FICA (Federal Insurance Contributions Act).

⁹ OWCP's hearing representative noted that appellant had advised that her spouse had died. He indicated that she might wish to submit a copy of the marriage certificate and death certificate and claim compensation and see if she was entitled to compensation at the augmented rate.

¹⁰ *Supra* note 1.

¹¹ 5 U.S.C. § 8106(b).

that there were unreported earnings. The Board has recognized that forfeiture is a penalty, and, as a penalty provision, it must be narrowly construed.¹² The term knowingly is defined within OWCP's regulations as with knowledge, consciously, willfully, or intentionally.¹³

OWCP regulations define earnings from employment or self-employment as: (1) gross earnings or wages before any deductions and includes the value of subsistence, quarters, reimbursed expenses and any other goods or services received in kind as remuneration; or (2) a reasonable estimate of the cost to have someone else perform the duties of an individual who accepts no remuneration.¹⁴ Neither lack of profits nor the characterization of the duties as a hobby removes an unremunerated individual's responsibility to report the estimated cost to have someone else perform his or her duties.¹⁵

ANALYSIS -- ISSUE 1

The Board finds that OWCP properly determined that appellant forfeited her right to compensation for the periods November 12, 1999 through March 10, 2003, March 23, 2003 through March 16, 2006, and December 31, 2006 through February 10, 2014, pursuant 5 U.S.C. § 8106(b)(2) of FECA, because she knowingly failed to report her employment activities and earnings. The Board finds that OWCP improperly determined that she forfeited her entitlement to compensation for the period March 11 through 22, 2003.

OWCP found that appellant forfeited her compensation from November 12, 1999 through March 16, 2003 and December 31, 2006 through February 10, 2014 as she failed to report employment activities on EN1032 forms covering these periods.

The EN1032 forms sent by OWCP to appellant advised her of her responsibility to complete the forms and provide all relevant information concerning her employment status and earnings during the 15-month period covered by the forms. The forms she signed noted that she must report all employment, self-employment, or involvement in business enterprises. This included such activities as overseeing a business of any kind, including involvement in any enterprise she owned. The forms further requested that appellant indicate whether she had performed volunteer work for any form of monetary or in-kind compensation.

In EN1032 forms signed February 12, 2001, January 18, 2002, March 10, 2003, June 23, 2004, March 3, 2005, March 16, 2006, March 31, 2008, March 25, 2009, February 28, 2010, February 6, 2011, February 10, 2012, January 26, 2013, and February 10, 2014, appellant responded that she had not engaged in any employment, self-employment, engaged in any business enterprise, or performed volunteer work for any form of compensation during the 15-month period covered by each form.

¹² *P.H.*, Docket No. 17-1362 (issued March 13, 2018).

¹³ 20 C.F.R. § 10.5(n); *R.A.*, Docket No. 18-0406 (issued January 28, 2019).

¹⁴ *Id.* at § 10.5(g).

¹⁵ *Id.*

In an investigative report dated August 23, 2016, J.B. advised that appellant had served as a pastor/reverend for the Church of the Beloved since at least November 2001. He submitted reports of interviews with parishioners verifying that appellant was in charge of the church, loan applications in which she listed the church as her employer, and a list of monetary transfers she made between her personal bank account and the church bank account. J.B. indicated that appellant had been indicated by a grand jury for violating 18 U.S.C. § 641, theft of money or property of the United States, and 18 U.S.C. § 1920, making a false statement to obtain benefits from OWCP, but indicated that the indictment had subsequently been dismissed.

The Board finds that appellant forfeited entitlement to wage-loss compensation from November 12, 1999 through March 10, 2003 and March 23, 2003 through March 16, 2006. In a statement dated April 17, 2006, C.M., the church treasurer, indicated that the church had paid the mortgage on appellant's home since 2001 and would continue to do so until the mortgage was paid. On a May 10, 2006 Uniform Residential Loan Application, appellant advised that she received \$1,318.75 monthly from the church, that the church was her employer, and that she had worked there for the past seven years. The evidence, consequently establishes that appellant had performed work at the church since at least 2000 and earned \$1,318.75 monthly. However, she signed EN1032 forms on February 12, 2001 covering the period November 1, 1999 to February 12, 2001, on January 18, 2002 covering the period October 18, 2000 to January 18, 2002, on March 10, 2003 covering the period December 10, 2001 to March 10, 2003, on June 23, 2004 covering the period March 23, 2003 through June 23, 2004, on March 3, 2005 covering the period December 3, 2003 to March 3, 2005, and on March 16, 2006 covering the period December 16, 2004 to March 16, 2006. On the forms appellant indicated that she did not perform any employment and was not self-employed for the periods covered by the forms. If a Form EN1032 is improperly completed resulting in a finding of forfeiture, the period of forfeiture is the entire 15-month period covered by the form in question.¹⁶ Appellant, consequently, forfeited her entitlement to compensation from November 12, 1999 through March 10, 2003 and March 23, 2003 through March 16, 2006.

The Board finds, however, that the evidence is insufficient to support that appellant forfeited her entitlement to wage-loss compensation from March 11 through 22, 2003. The record contains no Form EN1032 or other document covering this period. Without such a form or document, the period of forfeiture must be limited to the period in which it is established that the claimant actually worked and did not report/underreported earnings, or failed to disclose any self-employment or involvement in a business enterprise.¹⁷ In such a circumstance, OWCP must match the actual unreported earnings with a corresponding period of compensation received.¹⁸ It had not undertaken such analysis for this period. Accordingly, OWCP's finding of forfeiture for the period March 11 through 22, 2003 will be reversed.¹⁹

¹⁶ *J.C.*, Docket No. 16-1058 (issued July 10, 2017); *R.B.*, Docket No. 15-1946 (issued September 2, 2016); *Martin James Sullivan*, 50 ECAB 158 (1998).

¹⁷ *See T.P.*, Docket No. 17-0717 (issued April 11, 2018); *C.R.*, Docket No. 08-2425 (issued August 3, 2009).

¹⁸ *C.F.*, Docket No. 16-0916 (issued June 28, 2017).

¹⁹ *Id.*; *see also J.S.*, Docket No. 09-1640 (issued April 1, 2010).

The Board further finds that appellant forfeited her entitlement to compensation from December 31, 2006 to February 10, 2012. On the forms appellant indicated that she was not employed or self-employed. However, from January 14, 2004 to December 14, 2010, she transferred approximately \$28,781.00 from the church's business account to her personal checking account. The transfers were made during each period covered by EN1032 forms dated March 31, 2008 to February 10, 2012 covering the period December 31, 2006 to February 10, 2012. The bank transfers show that appellant engaged in business activities during these periods. Additionally, a 2007 annual report to the State of Arizona identified appellant as the reverend or director of the church. In applications to open consumer accounts in July and September 2009, she listed her employer as the church. As appellant did not report her employment activity when she completed the EN1032 forms covering the period December 31, 2006 to February 10, 2012, the Board finds that she forfeited her right to compensation for this period.

The Board further finds that appellant forfeited her right to wage-loss compensation from February 11, 2012 through February 10, 2014. For the Form EN1032 signed on January 26, 2013, covering the period October 26, 2011 through January 26, 2013, and the Form EN1032 signed February 10, 2014, covering the period November 10, 2012 through February 10, 2014, the Board notes that the OIG submitted an April 23, 2012 real estate listing advertising the church property for sale. It also submitted a memorandum indicating that an agent had telephoned the listing agent for the property who informed him that his client ran the property as a church but was considering retiring. A website for 2012 advertised the church and appellant's e-mail address. On August 11, 2013 J.B. and S.M. interviewed appellant at the church property, noting that there was a sanctuary on the inside of the property with crucifixes on the wall, an altar, and a row of chairs. Appellant advised that she was an ordained minister who volunteered at the church. The totality of the evidence, however, including interviews with former parishioners, establish that appellant, in her role as minister of the church, received donations for the church, was in charge of the church, and conducted the business of church. As noted, when a Form EN1032 is improperly completed resulting in a finding of forfeiture, the period of the forfeiture is the entire 15-month period covered by the form in question. The Board finds that appellant forfeited her entitlement to compensation for the 15-month periods preceding her signing of EN1032 forms on January 26, 2013 and February 10, 2014, covering the period October 26, 2011 through February 10, 2014.

Appellant can be subject to the forfeiture provision of section 8106(c) only if she knowingly failed to report earnings or employment. OWCP has the burden of proof to establish that a claimant did, either with knowledge, consciously, willfully, or intentionally, fail to report earnings from employment.²⁰ The Board finds that appellant indicating that the church was her employer on loan applications, the treasurer's statement that the church paid the mortgage on her house, and transferring money between the church account and her personal account is persuasive evidence that she knew that she had income from employment which she failed to disclose on the EN1032 forms. Appellant's signing of a strongly-worded certification clause on the EN1032 forms demonstrates that she was aware of the materiality of her failure to report her employment activity.²¹ Therefore, she knowingly failed to comply with the reporting requirements for the periods November 12, 1999 through March 10, 2003, March 23, 2003 through March 16, 2006,

²⁰ See *S.M.*, Docket No. 16-1612 (issued April 11, 2018).

²¹ *C.W.*, Docket No. 18-1557 (issued June 25, 2019); *M.O.*, Docket No. 18-0686 (issued January 25, 2019).

and December 31, 2006 through February 10, 2014. OWCP, consequently, properly found that she forfeited her entitlement to compensation for these periods.

LEGAL PRECEDENT -- ISSUE 2

Section 8102(a) of FECA provides that the United States shall pay compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of his or her duty.²² Section 8129(a) of FECA provides, in pertinent part, “When an overpayment has been made to an individual under this subchapter because of an error of fact or law, adjustment shall be made under regulations prescribed by the Secretary of Labor by decreasing later payments to which an individual is entitled.”²³

Section 10.529(b) of OWCP’s implementing regulations provides as follows:

“(b) Where the right to compensation is forfeited, OWCP shall recover any compensation already paid for the period of forfeiture pursuant to 5 U.S.C. § 8129 and other relevant statutes.”²⁴

ANALYSIS -- ISSUE 2

The Board finds that appellant received an overpayment of compensation but that the case is not in posture regarding the amount of overpayment resulting from the forfeiture decision.

OWCP regulations provide that OWCP must declare an overpayment of compensation for any compensation already paid the period of a given forfeiture of compensation.²⁵ If a claimant has any employment, including self-employment or involvement in a business enterprise, during a period covered by a Form EN1032 which he or she fails to report, the claimant is not entitled to compensation for any portion of the period covered by the report, even though he or she may not have had earnings during a portion of that period.²⁶ Appellant engaged in employment during periods covered by EN1032 forms and thus received an overpayment of compensation.

As discussed above, the Board found that appellant forfeited entitlement to compensation for the periods November 12, 1999 through March 10, 2003, March 23, 2003 through March 16, 2006, and December 31, 2006 through February 10, 2014. The Board further found that OWCP had not established that she forfeited her entitlement to compensation from March 11 through

²² 5 U.S.C. § 8102(b).

²³ *Id.* at § 8129(a).

²⁴ 20 C.F.R. § 10.529.

²⁵ *Id.*

²⁶ *Id.*

22, 2003. Consequently, the case must be remanded to OWCP to recalculate the overpayment based on the periods of her forfeiture of compensation as found by the Board.²⁷

LEGAL PRECEDENT -- ISSUE 3

Section 8129 of FECA provides that an overpayment in compensation shall be recovered by OWCP unless “incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of FECA or would be against equity and good conscience.”²⁸

Section 10.433(a) of OWCP’s regulations provides that OWCP:

“[M]ay consider waiving an overpayment only if the individual to whom it was made was not at fault in accepting or creating the overpayment. Each recipient of compensation benefits is responsible for taking all reasonable measures to ensure that payments he or she receives from OWCP are proper. The recipient must show good faith and exercise a high degree of care in reporting events which may affect entitlement to or the amount of benefits. A recipient who has done any of the following will be found to be at fault in creating an overpayment:

‘(1) Made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; or

‘(2) Failed to provide information which he or she knew or should have known to be material; or

‘(3) Accepted a payment which he or she knew or should have known to be incorrect. (This provision applies only to the overpaid individual).’²⁹

To determine if an individual was at fault with respect to the creation of an overpayment, OWCP examines the circumstances surrounding the overpayment. The degree of care expected may vary with the complexity of those circumstances and the individual’s capacity to realize that he or she is being overpaid.³⁰

²⁷ *T.P.*, Docket No. 17-0717 (issued April 11, 2018); *J.A.*, Docket No. 14-1863 (issued July 7, 2015).

²⁸ 5 U.S.C. § 8129; *see A.S.*, Docket No. 17-0606 (issued December 21, 2017); *Linda E. Padilla*, 45 ECAB 768 (1994).

²⁹ 20 C.F.R. § 10.433(a); *see K.F.*, Docket No. 19-1016 (issued February 14, 2020); *Sinclair L. Taylor*, 52 ECAB 227 (2001).

³⁰ *Id.* at § 10.433(b); *J.C.*, Docket No. 19-0911 (issued March 25, 2021); *Duane C. Rawlings*, 55 ECAB 366 (2004).

ANALYSIS -- ISSUE 3

The Board finds that OWCP properly determined that appellant was at fault in the creation of the overpayment which occurred due to her forfeiture of compensation, thereby precluding waiver of recovery of the overpayment.

As discussed above, the record supports that appellant had employment activity for the periods November 12, 1999 through March 10, 2003, March 23, 2003 through March 16, 2006, and December 31, 2006 through February 10, 2014. Appellant signed EN1032 forms on February 12, 2001, January 18, 2002, March 10, 2003, June 23, 2004, March 3, 2005, March 16, 2006, March 31, 2008, March 25, 2009, February 28, 2010, February 6, 2011, February 10, 2012, January 26, 2013, and February 10, 2014 advising that she had no earnings and participated in no employment or self-employment activities.

The explicit language of the EN1032 forms demonstrate that appellant knew or should have known that the nature of her work activity at the church would require her to report such employment activities and earnings on the forms.³¹ Her failure to accurately report her earnings and employment activities on the EN1032 forms constitutes a failure to provide information which she knew or should have known to be material in the creation of the overpayment.³² Consequently, appellant is not eligible for a waiver of recovery of the overpayment.³³

LEGAL PRECEDENT -- ISSUE 5

Section 8102(a) of FECA provides that the United States shall pay compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of his or her duty.³⁴ Section 8116 limits the right of an employee to receive compensation. While an employee is receiving compensation, he or she may not receive salary, pay, or remuneration of any type from the United States.³⁵

Section 10.421(d) of OWCP's implementing regulations requires OWCP to reduce the amount of compensation by the amount of any SSA age-related retirement benefits that are attributable to the employee's federal service.³⁶ FECA Bulletin No. 97-09 states that FECA benefits have to be adjusted for the FERS portion of SSA benefits because the portion of the SSA

³¹ *M.O.*, *supra* note 21; *J.A.*, Docket No. 14-1863 (issued July 7, 2015).

³² *B.K.*, Docket No. 17-0406 (issued December 12, 2017).

³³ In view of the Board's disposition of Issue 2, Issue 4 is moot.

³⁴ 5 U.S.C. § 8102(a).

³⁵ *Id.* at § 8116.

³⁶ 20 C.F.R. § 10.421(d); *see S.M.*, Docket No. 17-1802 (issued August 20, 2018).

benefit earned as a federal employee is part of the FERS retirement package, and the receipt of FECA benefits and federal retirement concurrently is a prohibited dual benefit.³⁷

ANALYSIS -- ISSUE 5

The Board finds that appellant received an overpayment of wage-loss compensation in the amount of \$7,511.77 for the period January 1, 2016 through April 27, 2019, for which she was without fault, because she concurrently received FECA wage-loss compensation benefits and SSA age-related retirement benefits without appropriate offset.

OWCP paid appellant wage-loss compensation for total disability following her injury. She subsequently began receiving SSA age-related retirement benefits. As noted, a claimant cannot receive FECA compensation for wage-loss and SSA age-related retirement benefits attributable to federal service for the same period.³⁸ Accordingly, the Board finds that fact of overpayment has been established.³⁹

To determine the amount of the overpayment, the portion of SSA age-related retirement benefits attributable to federal service must be calculated. OWCP received documentation from SSA with respect to the specific amount of SSA age-related retirement benefits that were attributable to federal service. SSA provided the SSA rates with FERS and without FERS for specific periods from January 1, 2016 through April 27, 2019. OWCP set forth its calculations of the amount that should have been offset during the relevant period based on information provided by SSA for the period January 1, 2016 through April 27, 2019.

The Board has reviewed OWCP's calculation of dual benefits received by appellant for the period January 1, 2016 through April 27, 2019 and finds that an overpayment of compensation in the amount of \$7,511.77 was created.⁴⁰

LEGAL PRECEDENT -- ISSUE 6

Section 8129 of FECA provides that an overpayment must be recovered unless incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of FECA or would be against equity and good conscience.⁴¹ Thus, a finding that appellant was without fault does not automatically result in waiver of the overpayment.

³⁷ FECA Bulletin No. 97-09 (issued February 3, 1997). See also *N.B.*, Docket No. 18-0795 (issued January 4, 2019).

³⁸ *Supra* note 36; see *A.C.*, Docket No. 18-1550 (issued February 21, 2019).

³⁹ See *S.H.*, Docket No. 20-1157 (issued December 23, 2020); *K.H.*, Docket No. 18-0171 (issued August 2, 2018).

⁴⁰ See *N.B.*, Docket No. 20-0727 (issued January 26, 2021); *L.L.*, Docket No. 18-1103 (issued March 5, 2019).

⁴¹ 5 U.S.C. § 8129(a)-(b).

OWCP must exercise its discretion to determine whether recovery of the overpayment would defeat the purpose of FECA or would be against equity and good conscience.⁴²

According to 20 C.F.R. § 10.436, recovery of an overpayment would defeat the purpose of FECA if recovery would cause hardship because the beneficiary needs substantially all of his or her income (including compensation benefits) to meet current ordinary and necessary living expenses, and also, if the beneficiary's assets do not exceed a specified amount as determined by OWCP from data provided by the Bureau of Labor Statistics.⁴³ An individual's liquid assets include, but are not limited to, cash on hand, value of stocks, bonds, savings accounts, mutual funds, and certificates of deposits. Nonliquid assets include, but are not limited to, the fair market value of an owner's equity in property such as a camper, boat, second home, furnishings/supplies, vehicle(s) above the two allowed per immediate family, retirement account balances (such as Thrift Savings Plan or 401(k)), jewelry, and artwork.⁴⁴

Section 10.437 provides that recovery of an overpayment is considered to be against equity and good conscience when an individual who received an overpayment would experience severe financial hardship attempting to repay the debt and when an individual, in reliance on such payments or on notice that such payments would be made, gives up a valuable right or changes her position for the worse.⁴⁵

ANALYSIS -- ISSUE 6

The Board finds that OWCP properly denied waiver of recovery of the overpayment.

As OWCP found appellant not at fault in the creation of the overpayment, waiver must be considered, and repayment is still required unless adjustment or recovery of the overpayment would defeat the purpose of FECA or be against equity and good conscience.⁴⁶ Appellant, however, has the responsibility to provide the appropriate financial information and documentation to OWCP.⁴⁷

In its preliminary overpayment determination, dated May 9, 2019, OWCP requested that appellant provide a completed Form OWCP-20 and supporting financial information, including copies of income tax returns, bank account statements, bills and cancelled checks, pay slips, and

⁴² *C.B.*, Docket No. 20-0031 (issued July 27, 2020); *G.L.*, Docket No. 19-0297 (issued October 23, 2019).

⁴³ 20 C.F.R. § 10.436. OWCP procedures provide that a claimant is deemed to need substantially all of his or her current net income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than \$50.00. Its procedures further provide that assets must not exceed a resource base of \$6,200.00 for an individual or \$10,300.00 for an individual with a spouse or dependent plus \$1,200.00 for each additional dependent. Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Final Overpayment Determinations*, Chapter 6.400.4(a)(2) and (3) (September 2018).

⁴⁴ *Id.* at Chapter 6.400.4b(3)(a), (b).

⁴⁵ 20 C.F.R. § 10.437(b)(1).

⁴⁶ *Id.* at § 10.436.

⁴⁷ *Id.* at § 10.438. See *E.S.*, Docket No. 20-0919 (issued February 8, 2021).

any other records to support income and expenses. It advised her that it would deny waiver of recovery of the overpayment if she failed to furnish the requested financial information within 30 days. Appellant did not timely submit a completed Form OWCP-20 or the financial information necessary for OWCP to determine if recovery of the overpayment would defeat the purpose of FECA or be against equity and good conscience.⁴⁸

Accordingly, as appellant did not submit the information required under 20 C.F.R. § 10.438 of OWCP's regulations to determine her eligibility for waiver, the Board finds that OWCP properly denied waiver of recovery of the overpayment.⁴⁹

LEGAL PRECEDENT -- ISSUE 7

The Board's jurisdiction over recovery of an overpayment is limited to reviewing those cases where OWCP seeks recovery from continuing compensation under FECA.⁵⁰

Section 10.411 of OWCP's regulations provides in pertinent part:

"When an overpayment has been made to an individual who is entitled to further payments, the individual shall refund to OWCP the amount of the overpayment as soon as the error is discovered or his or her attention is called to same. If no refund is made, OWCP shall decrease later payments of compensation, taking into account the probable extent of future payments, the rate of compensation, the financial circumstances of the individual, and any other relevant factors, so as to minimize any hardship."⁵¹

ANALYSIS -- ISSUE 7

The Board finds that OWCP properly required repayment of the \$7,511.77 overpayment by deducting \$236.26 from appellant's continuing compensation payments every 28 days.

As discussed, appellant did not complete the overpayment recovery questionnaire or provide the necessary financial information to support her income and expenses. The overpaid individual is responsible for providing information about income, expenses, and assets as specified by OWCP.⁵² When an individual fails to provide requested financial information, OWCP should follow minimum collection guidelines designed to collect the debt promptly and in full.⁵³ As appellant did not submit the financial documentation to OWCP as requested, the Board finds that

⁴⁸ *J.C.*, Docket No. 20-1062 (issued January 4, 2021); *E.M.*, Docket No. 19-0857 (issued December 31, 2019).

⁴⁹ *J.C.*, *id.*

⁵⁰ 20 C.F.R. § 10.441; *see M.P.*, Docket No. 18-0902 (issued October 16, 2018).

⁵¹ *Id.* at § 10.441(a).

⁵² 20 C.F.R. § 10.438.

⁵³ *E.M.*, *supra* note 48; Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Debt Liquidation*, Chapter 6.500.2 (September 2018).

OWCP properly directed recovery of the \$7,511.77 overpayment of compensation at the rate of \$236.26 every 28 days from her continuing compensation payments.⁵⁴

CONCLUSION

The Board finds that OWCP properly determined that appellant forfeited her right to compensation for the periods November 12, 1999 through March 10, 2003, March 23, 2003 through March 16, 2006, and December 31, 2006 through February 10, 2014, pursuant 5 U.S.C. § 8106(b)(2) of FECA, because she knowingly failed to report her employment activities and earnings. The Board also finds that OWCP improperly determined that she forfeited her entitlement to compensation for the period March 11 through 22, 2003. The Board further finds that the case is not in posture for decision regarding the amount of overpayment created by the forfeiture of compensation. The Board finds that OWCP properly determined appellant was at fault in the creation of the overpayment, thereby precluding waiver of recovery of the overpayment and that it is premature to address recovery of the overpayment pending the determination of the amount of the overpayment created by the forfeiture of compensation. The Board further finds that OWCP properly determined that appellant received an overpayment of wage-loss compensation in the amount of \$7,511.77 for the period January 1, 2016 through April 27, 2019, for which she was without fault, because she concurrently received FECA wage-loss compensation benefits and SSA age-related retirement benefits without appropriate offset, that OWCP properly denied waiver of recovery of the overpayment, and that OWCP properly required recovery of the overpayment by deducting \$263.26 from her continuing compensation payments every 28 days.

ORDER

IT IS HEREBY ORDERED THAT the May 17, 2019 forfeiture decision of the Office of Workers' Compensation Programs is affirmed in part and reversed in part. The May 17, 2019 decision concerning the overpayment resulting from the forfeiture is affirmed in part and set aside

⁵⁴ See *J.A.*, Docket No. 19-1946 (issued July 13, 2020); *E.K.*, Docket No. 18-0587 (issued October 1, 2018).

in part. The June 13, 2019 decision regarding the SSA/FERS overpayment is affirmed. The case is remanded for further proceedings consistent with this decision of the Board.

Issued: August 10, 2021
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board